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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. [redacted] 73

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ANTONIA AMBROSE, as Administratrix of the Estate of John Ambrose, deceased,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Hudson County, New Jersey

ALBERT C. WALL,
JOHN A. HARTPENCE,
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IN THE

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NEW YORK CENTRAL RAILROAD COMPANY,
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vs.
ANTONIA AMBROSE, as Administratrix of the Estate of John Ambrose, deceased,
Respondent.

PLEASE TAKE NOTICE that we have filed in the Supreme Court of the United States a petition for a Writ of Certiorari in this cause and a brief in support thereof; also a copy of the record herein. Copies of said petition, brief and record are herewith served upon you. Pursuant to the provision of the rules of said Supreme Court, said petition, brief and record will be submitted to said Court on the first motion day following the expiration of twenty days after service of this notice upon you.

Dated, Jersey City, N. J., April 22, 1929.

ALBERT C. WALL,
JOHN A. HARTPENCE,
Counsel for Petitioner.

To:

ALEXANDER SIMPSON, Esq.,
Counsel for Respondent:

Due service of the foregoing notice and a copy of the petition, record and brief therein mentioned is hereby acknowledged this day of April, 1929.

.....
Counsel for Respondent.

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No.....

NEW YORK CENTRAL RAILROAD COMPANY,
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ANTONIA AMBROSE, as Administratrix of the Estate of John Ambrose, deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HUDSON COUNTY, NEW JERSEY

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The New York Central Railroad Company, the petitioner herein, respectfully represents:

1. This action was brought in the Circuit Court of Hudson County, New Jersey, under the Federal Employers' Liability Act by the respondent (plaintiff below) against petitioner (defendant below) to recover damages for the death of John Ambrose, deceased, respondent's intestate.

2. The complaint alleges that the intestate was employed by petitioner in interstate commerce at its grain elevator at Weehawken, New Jersey; that petitioner negligently and without warning to decedent used in the elevator certain poisonous gases where intestate was at work by which he was overcome and caused to fall into a shaft and was killed (Record, page 2, line 10). The "shaft," so-called, is bin 81 in petitioner's elevator.

3. The answer denies the alleged negligence, denies that at the time of the accident deceased was engaged in interstate commerce, and alleges as a separate defence that decedent's injuries and death were caused by his negligence, and his disobedience of petitioner's orders in going to the place where he received the injuries when to his knowledge it was obviously dangerous so to do (Record, page 3, line 30).

4. On May 11, 1928, respondent recovered judgment in said Hudson County Circuit Court for $6,428.60 damages and costs (Record, page 86).

5. Petitioner appealed from said judgment to the New Jersey Court of Errors and Appeals in the last resort in all causes, and that Court, on February 4, 1929, affirmed said judgment by an equally divided Court, six members voting to affirm, and six members voting to reverse. By reason of the equal division of said Court, no opinion was delivered (Record, page 98).

6. On February 14, 1929, pursuant to the order of said Court of Errors and Appeals, the record with the order of affirmance of said judgment was remitted to the Circuit Court of Hudson County, New Jersey, where it now remains.

The Matters Involved

7. The questions presented on this application are:

(a) Was negligence proved against petitioner?

(b) At the time of the accident, was respondent's intestate engaged in interstate commerce?

(c) Was the death of decedent due to his own negligence and his disobedience of petitioner's orders?

(d) Did the evidence warrant submitting to the jury the questions (1) of petitioner's negligence; (2) of decedent's negligence?

Summary of Facts

8. Petitioner is a common carrier engaged in both interstate and intrastate commerce. It operates a grain elevator at Weehawken, New Jersey, where it receives interstate shipment of grain transported over its railroad lines, both for storage and for further transportation. Some of the grain is shipped from said elevator to points outside of the State of New Jersey and some to points within that State.

9. The elevator is several stories high. One of the floors is called "the bin floor." Its dimensions are about 300 feet by 130 feet (Record, page 35, line 15).

10. In this elevator there are 291 bins; 268 are storage bins and 23 are shipping bins (Record,

page 66, line 32). The accident happened in bin 81. All grain is shipped out of the elevator from the shipping bins. The "bin floor" is of concrete and covers the tops of all the bins. The storage bins extend from that floor downward to a depth of about 85 feet. In the concrete floor covering these bins are round spout holes, 17 inches in diameter, into which are inserted grain spouts which carry the grain into the bins. One or more of these spout holes opens into each bin.

Over each bin there is also a rectangular manhole 20 inches by 16¾ inches through which, when necessary, entrance to the bins is had. The spout holes and manholes are covered by metal covers, the edges of which rest on shoulders or flanges in the concrete floor. These metal covers when in place are level with the surface of the floor.

Exhibit P. 3 (Record, page 97) is a photograph of a portion of the bin floor, including the part over storage bin 81, and showing spout holes and the manhole over that bin.

Exhibit P. 2 (Record, page 95) is a photograph of the interior of bin 81, taken from the top looking down. The iron bars across one corner of the bin constitute a ladder for entering the bin when necessary.

11. Respondent's intestate was employed as a "floorman" on the bin floor. His duties were to sweep that floor, and when called upon, to assist in setting the trolleys for running grain into the bins (Record, page 6, line 15). A co-employee, John E. Fitzpatrick, worked with and performed the same duties on this floor as decedent (Record, page 12, line 5). William J. Dillworth was foreman of the floor (Record, page 5, line 16). These were the only employees working on that floor (Record, page 14, line 24; page 68, line 12).

12. On July 16, 1927, shortly before 10 A. M. respondent's intestate was discovered dead in the bottom of storage bin 81. There was no eye-witness to the accident which resulted in his death. No one knows when, under what circumstances, or why he entered the bin. There was no reason for his entering it and he did so against petitioner's orders.

13. So far as known the circumstances leading up to the accident were as follows: On Tuesday, July 12, 1927, Mr. Shanahan, the Superintendent of the elevator, was approached by a Mr. Hubbel, representing the Air Reduction Company, who requested the use of a bin in the elevator to experiment with a preparation for exterminating boll weevil in grain. The experiment consisted of mingling a powder with the grain as it was run through the spouts into the bin. When in the bin the heat and moisture of the grain acting on the powder produced a gas which permeated the grain, and was said to kill the weevil. Mr. Hubbell had been performing this experiment in various elevators around New York Harbor. Mr. Shanahan, not having instructions from his superior to permit the experiment, asked Mr. Hubbell if he had secured permission to make the experiment in that elevator. He eventually satisfied Mr. Shanahan that he had permission and promised to produce letters to that effect from petitioner, and Mr. Shanahan then consented to the experiment (Record, page 25, line 20; page 27, line 18). The promised letter of authority, however, was never produced, and petitioner in fact never consented to the experiment (Record, page 27, line 20). Shanahan had no authority to permit the experiment (Record, page 35, line 25).

14. In the afternoon of Tuesday, July 12, 1927, a quantity of grain was run from storage bin 208 through spouts into bin 81 (Record, page 64, line 15). The powder was mingled with the grain as it passed through the spouts. This was done on the floor above the bin floor (Record, page 25, line 33; page 27, line 25). When so used the powder was entirely harmless. The gas developed therefrom after the grain was in the bin was poisonous. There being no weevil in this grain, forty small bags about two inches in length containing weevil were dropped at intervals by the experimenter into the grain as it was passing through the spout (Record, page 26, line 20; page 28, line 24).

15. After running the grain into bin 81, the openings over that bin were closed (Record, page 28, line 15). The grain was allowed to remain there seventy-two hours until Friday afternoon, July 16. In the meantime, work was carried on as usual on the bin floor by decedent and the two other employees of that floor without any injury or any inconvenience from the gas, or any indication that the gas was present except on the two occasions hereinafter mentioned, when one or more of the covers of the bin were removed (Record, page 67, line 30; page 70, line 20). Dillworth told decedent to keep away from the bin; that "he would not trust the stuff," and that it was poisonous (Record, page 16, line 30; page 17, line 36; page 68, line 15).

16. On Friday afternoon, July 15, under the direction of Mr. Hubbell, the grain was drawn out of bin 81 from the bottom and returned to storage bin 94 (Record, page 28, line 38; page 64, line 15). The weevil bags were recovered as the

grain was drawn off. One bag was missing. Dillworth was directed to see if he could locate this bag. He removed a cover from the top of the bin, dropped an electric light bulb attached to a cord into the bin to illuminate the interior and discovered the missing bag caught at the intersection of cross rods "five or six rungs from the bottom." When Dillworth looked into the bin and discovered the bag, decedent was with him, and looked into the bin at the same time. A cover from the bin being removed, there was quite a strong odor of gas noticeable when they were at the opening looking into the bin (Record, page 16, line 18; page 17, line 28).

17. On the morning of July 16, the three employees, Dillworth, decedent and Fitzpatrick, went to work on the bin floor about eight o'clock as usual. The covers were all on bin 81 (Record, page 18, line 12; page 23, line 23). Dillworth went down to the first floor of the elevator some time after nine o'clock. When he returned to the bin floor about 20 minutes before the accident he passed bin 81, and all the covers were then on (Record, page 12, line 25). He went into his shanty (on the bin floor) and about twenty minutes afterward heard the sound of something falling. He left his shanty and discovered that the cover of the manhole and the cover of one of the spout holes of bin 81 were off. Through the spout hole an electric drop light was hanging down into the bin, the bulb being near the bottom, and on looking into the bin he discovered the body of decedent at the bottom (Record, page 13, line 38; page 51, line 14). The last time Dillworth saw decedent alive was about nine o'clock on that

morning and he was then sweeping the floor. The next time he saw him he was at the bottom of the bin (Record, page 8, line 1). The first time Dillworth had noticed any of the covers off the openings of the bin on Saturday morning was after he heard the noise of decedent's fall (Record, page 18, line 12).

18. The only time employees went into these bins was when in drawing off the grain it became clogged so that all of it did not flow out. Under such circumstances, one of the sweepers would be directed to go into the bin and clean out the clogged grain (Record, page 6, line 28; page 7, line 32). On this occasion there was no clogging of the grain in bin 81 (Record, page 17, line 12).

19. The floormen were forbidden to enter the bins unless ordered so to do by the foreman of the floor or the superintendent of the elevator (Record, page 15, line 35; page 30, line 28). Dillworth gave decedent no instructions to go into the bin on Friday or Saturday, and did not know he was going into the bin (Record, page 16, line 35). Shanahan, the Superintendent of the elevator, was not present on the day of the accident. He left for Buffalo on Friday afternoon (Record, page 29, line 5). Brewer, the weigher, did not call decedent to do anything on Saturday morning, nor did he call for anything to be done in connection with bin 81 (Record, page 64, line 5). On Saturday morning, neither Dillworth nor Fitzpatrick removed any of the covers from bin 81, nor did they see anyone remove any of these covers, or drop the electric light into the bin. No one saw the accident or saw decedent just prior thereto (Record, page 69, line 32; page 70, line 28).

20. The movement and treatment of the grain was solely for experimental purposes made at the request and for the benefit of Mr. Hubbell, and was never consented to by petitioner (Record, page 25, line 20; page 27, line 18; page 35, line 22). There were no weevil in the grain except what was placed in it by Mr. Hubbell for the experiment. No treatment of the grain was necessary to fit it for further shipment (Record, page 28, line 25). It was wholly unnecessary to remove the little bag of weevil from the bin (Record, page 29, line 15).

Reasons Relied on for Allowance of the Writ

1. The State Court of New Jersey has decided federal questions of substance in a way probably not in accord with applicable decisions of this Court, to wit:

(a) The State Court erroneously decided that the evidence warranted a finding of negligence on the part of petitioner.

(b) The State Court erroneously decided that the evidence warranted a finding that at the time of the accident decedent was engaged in interstate commerce.

(c) The State Court erroneously decided that the evidence warranted a finding that decedent's death was not due to his own negligence.

To this petition is annexed a supporting brief and with it is presented a certified transcript of the record and proceedings in the Hudson County Circuit Court and in the New Jersey Court of Errors and Appeals.

Wherefore petitioner prays that a writ of certiorari may be issued to the Circuit Court of Hudson County of New Jersey where the record herein is now lodged, requiring that Court to certify said record and judgment to this Court to the end that the errors complained of may here be reviewed and corrected.

Dated April 15, 1929.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner.

By ALBERT C. WALL,
JOHN A. HARTPENCE,
Its Attorneys.

IN THE

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No.....

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ANTONIA AMBROSE, as Administratrix of the Estate of John Ambrose, deceased,
Respondent.

BRIEF IN SUPPORT OF PETITION

Point I

No negligence was established against petitioner.

1. The mere use of the poisonous gas, produced after the grain was in the bin, was in no way dangerous, and hence was not negligent.

The fact that it was not dangerous is incontrovertibly established by the fact that after the grain had been treated and run into bin 81, petitioner's employees, including decedent, carried on their usual work on the bin floor in the usual manner from Tuesday afternoon until Saturday morn-

ing at about 9:45 o'clock—more than three and a half days—without being in the slightest degree affected by the gas, so long as the openings of the bin were kept closed.

2. Only when the cover was removed and a person stood or bent over the opening, was the gas noticeable, and then the effect, though apparent, was not serious, as is evidenced by the effect on Dillworth and decedent when they were looking through the opening for the missing bag on Friday afternoon.

3. Neither Dillworth nor Fitzpatrick, the only employees other than decedent on the bin floor, opened the bin on Saturday morning, or saw it open. Hence, petitioner did no act which rendered the place of work unsafe.

4. Under the Federal Employers' Liability Act, negligence must be established against defendant, otherwise there can be no recovery. *Seaboard Air Line R. Co.* v. *Horten,* 233 U. S., p. 492; *Missouri Pacific R. R. Co.* v. *Aeby,* 275 U. S. 426 (at p. 429); *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170 (at p. 172).

5. This case is brought under the Federal Employers' Liability Act and is governed by that act and by the principles of the common law as applied in the Courts of the United States. *Missouri Pacific R. R. Co.* v. *Aeby,* 275 U. S. p. 426 (at p. 429); *Toledo St. Louis & Western R. Co.* v. *Allen,* 276 U. S., p. 165 (at p. 169 bottom).

6. This Court will examine the record and if found as a matter of law that the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of death, the judgment of

the State Court will be reversed. *Chicago M. & St. P. R. Co.* v. *Coogan,* 271 U. S., p. 472 (at p. 474), and cases cited in that opinion.

7. There was no eye witness to the accident. The evidence wholly fails to disclose how it happened. The record leaves the whole matter in the realm of speculation and conjecture. This is insufficient to sustain the judgment. *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Coogan,* 271 U. S. 472 (at p. 478) and cases cited.

8. Not only did the respondent fail to fix negligence upon petitioner, but the evidence affirmatively demonstrated that it had been guilty of no negligence. Hence, petitioner was entitled to a judgment of non-suit, and at the close of the case to a directed verdict.

9. Where there is but a mere *scintilla* of evidence, the State Court, in actions brought under the Federal Employers' Liability Act, is required to follow the rule established in the Federal Courts and order a non-suit, or direct a verdict for defendant.

Baltimore & Ohio R. Co. v. *Groeger,* 266 U. S. p. 521;

Gulf M. & N. R. Co. v. *Wells,* 275 U. S. p. 455;

Toledo St. Louis & Western R. Co. v. *Allen,* 276 U. S. p. 165;

Western & Atlantic R. R. Co. v. *Hughes,* Admrx., decided by this Court February 18, 1929, 73 U. S. Law Ed., Advanced Opinions, March 1, 1929, page 268.

Point II

At the time of the accident decedent was not engaged in interstate commerce.

Whether in sweeping the floor of the "bin floor" decedent was engaged in interstate commerce is immaterial. That employment did not require him either to uncover bin 81 or enter it. That he did remove the cover from the spout hole, drop the electric light into the bin, remove the manhole and enter the bin is the only logical conclusion from the evidence . Both these covers were in place when decedent went to work the morning of the accident. Neither of the other two employees on that floor removed these covers or dropped the electric light into the bin. That these covers were removed and the light dropped into the bin immediately preceding the accident was undisputed. No one but decedent could have done this. That he entered the bin voluntarily seems beyond dispute. That in sweeping in the vicinity of the bin or even over the covers, he could accidentally have removed the covers and have been thereby overcome by gas and fallen into the bin is beyond belief. The fact that the cover of a spout hole and the cover of the manhole had been removed, and that the electric drop light had been dropped into the bin through one of these openings renders any theory of the accidental removal of these covers impossible of belief. In this connection it will be noted from Exhibit P. 3 (Record, page 97) that the round spout holes and the oblong manhole were a considerable distance apart. Furthermore, decedent had been warned of the poisonous nature of the gas and had been directed to keep away from the bin.

All of these facts and circumstances show conclusively that decedent had abandoned his employment in interstate commerce, had departed from the duties required of him and had voluntarily and unnecessarily entered into a place of danger where his duty did not call him and from which his orders required him to keep away.

If it be suggested that he entered the bin for the purpose of removing the little bag of weevil, respondent's case is not aided for there was no necessity whatever to remove this bag from the bin.

In *Erie R. R. Co.* v. *Welsh,* 242 U. S. 303, this Court said (page 306):

> "By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. *Illinois C. R. R. Co.* v. *Behrens,* 233 U. S. 473, 478, 58 L. Ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C 163, 10 N. C. C. 153."

To the same effect is *Minneapolis & St. Louis R. R. Co.* v. *Winters,* 242 U. S. 353.

In *Krysiak* v. *Penn. R. R. Co.,* 270 Fed. 758 (C. C. A. Third Circuit), plaintiff's intestate had been employed in interstate commerce during the day and in leaving his place of employment to go home, chose a dangerous way instead of the safe way provided by his employers. While using that way he was injured.

The Court said (page 760):

> "At that moment, we think, Krysiak ended his employment and lost the status of an em-

> ployé in interstate commerce. Later, when he was killed, he was not engaged in his employer's work, or in an incident to it, but was engaged in his own private concerns."

Tested by the rule laid down in the foregoing cases, at the time of the accident decedent was not engaged in interstate commerce or in any duty pertaining to his employment, and petitioner was not liable for the injury sustained.

Point III

Decedent's injuries and death were due to his own negligence.

For three and a half days decedent had worked in safety and without inconvenience on the bin floor. Had he obeyed orders and not uncovered the bin and attempted to enter it, as he undoubtedly did, the accident would not have happened.

We respectfully submit that for the reasons stated the writ of certiorari should issue.

ALBERT C. WALL,
JOHN A. HARTPENCE,
Counsel for Petitioner.